No. 14-1458

In The
Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC.,
AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MARY A. BEDIKIAN, DANIEL BARNHIZER AND GEORGE T. ROUMELL, JR. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For over thirty years, this Court has made clear that in enacting the Federal Arbitration Act ("FAA"), the goal of Congress was to equalize arbitration agreements with all other contracts by ensuring their enforceability in the face of hostile state law. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Perry* v. *Thomas*, 482 U.S. 483 (1987); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011). Thus, state laws cannot single out arbitration agreements for different treatment without contravening the letter and spirit of the FAA.

Here, the Ninth Circuit failed to apply a clear and unambiguous contract severability clause. If that clause had been applied, problematic parts of the contract could have been severed while preserving the remainder. Instead of proceeding in this fashion, the courts below employed a standard to assess contract unconscionability that differs from the standard used when arbitration is not at issue. On that basis, the parties' clear agreement to arbitrate was defeated.

The result here circumvents the mandate of the FAA, which has been construed broadly by this Court to ensure that arbitration remains a viable alternative to the judicial process. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Co.*, 460 U.S. 1 (1983) (declaring a liberal federal policy favoring arbitration).

QUESTION PRESENTED – Continued

The rationale which drove the decision below will have a recurring, detrimental impact on rights guaranteed by the FAA unless this Court intervenes.

The question presented is whether California's arbitration-only severability rule is preempted by the FAA.

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BRIEF OF MARY A. BEDIKIAN, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Mary A. Bedikian is a Professor of Law in Residence and Director of the ADR Program at Michigan State University College of Law. She is also of counsel to the National Center for Dispute Settlement ("NCDS") and a former Vice-President of the American Arbitration Association ("AAA"),[2] both of which are ADR service providers. She is joined in this *amici* brief by Daniel Barnhizer, Professor of Law and Bradford Stone Faculty Scholar, and George T. Roumell, Jr., a member of the National Academy of Arbitrators and Professor of Labor Arbitration, both affiliated with Michigan State University College of Law.

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[1] Pursuant to Supreme Court Rule 37, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. *Amici* file this brief with written consent from all parties and all parties received timely notice.

[2] Formerly, Vice-President, American Arbitration Association (1975-2003). Professor Bedikian served on the AAA's Employment Task Force and the Labor Arbitration Task Force, assisted in the promulgation of rules and due process protocols, and trained both employment and commercial arbitrators nationally.

The arbitration agreement invalidated by the Ninth Circuit in this case is found in a standard counseling services contract that *explicitly* references the rules of the AAA. AAA is an independent, private 501(c)(3) organization that provides domestic and international dispute resolution services to parties in conflict. Founded in 1926, one year after the passage of the Federal Arbitration Act, AAA's mandate includes: (a) administering informal dispute resolution mechanisms; (b) training mediators and arbitrators; (c) designing ADR systems; and (d) promoting the responsible use of ADR.

AAA is the largest provider of alternative dispute resolution services in the world. Each year, AAA processes hundreds of thousands of international, labor, employment, construction and commercial cases. Its rules are time-tested and due process-compliant. This Court has relied on the expertise and reputation of the AAA through *amicus* filings in numerous arbitration cases that have been decided in favor of arbitration over the last twenty years. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *Stolt-Nielsen S.A.* v. *Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010); *BG Grp. PLC* v. *Republic of Argentina*, 143 S. Ct. 1198 (2014).

The Ninth Circuit's decision here seriously undercuts enforcement of arbitration agreements by

refusing to apply the state law contract severability principles that govern when arbitration is not at issue. It is imperative that this Court grant the writ to assure that arbitration contracts are treated with equal dignity by state contract law, as Congress intended by the FAA.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is commonplace today for virtually every industry in the United States to employ some form of ADR, notably arbitration. "The proliferation of arbitration agreements in employment and commercial contracts has increased exponentially over the past century as employers and businesses, intent on avoiding the judicial system for resolving disputes, have incorporated arbitration clauses into virtually all of the standardized form contracts." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 41 (2006); see also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 ("Arbitration clauses now appear in many of the form contracts through which consumers obtain goods, services and credit."). Thus, this case has broad implications for all United States businesses and industries that use arbitration, and for all major service providers that promulgate rules and

procedures under which civil disputes subject to arbitration clauses are administered. These organizations include the American Arbitration Association, the International Centre for Dispute Resolution [the international arm of AAA], JAMS/Endispute, International Center for Public Resources [formerly, Center for Public Resources], and the National Center for Dispute Settlement.

The decision below and its rationale jeopardize widely-employed dispute resolution clauses. The Ninth Circuit repudiates the strong public policy in favor of arbitration by invalidating an unambiguous, bilateral arbitration agreement under the guise of declaring it procedurally and substantively unconscionable. In doing so, the court applied principles of California contract law that discriminate against arbitration agreements by subjecting them to a contract law analysis that disfavors the severance of unconscionable provisions in otherwise enforceable contracts.

The Ninth Circuit's decision not to sever purportedly unconscionable terms or provisions undermines the strong federal policy promoting arbitration. The provisions declared unconscionable here do not affect the central purpose of the contract. Most importantly, their elimination as unconscionable would not contravene the parties' remaining, intended contract terms or prevent arbitration from moving forward in an effective manner. Consequently, contract severance principles should apply just as they would if arbitration was not at issue. This Court has repeatedly

upheld the enforcement of arbitration arising out of both voluntary and mandatory arbitration clauses when the claimant is able to achieve equal treatment in the arbitral forum. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Ninth Circuit's failure to apply the contract's severability clause violates the FAA's mandate that arbitration agreements should be placed on the same footing as all other contracts. *Southland* v. *Keating*, 465 U.S. 1 (1984); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996).

Even assuming the existence of substantively unconscionable provisions in the contract here, the proper remedy would have been to sever the offensive provisions, and permit arbitration to take place. Although the decision to sever is left to trial court discretion, in exercising that discretion courts must look to *the central purpose of the contract* to determine whether it is tainted with illegality or whether the illegality is collateral to the contract's main purpose. *Pokorny* v. *Quixtar, Inc.*, 601 F.3d 987, 1005 (9th Cir. 2010). In this case, two factors favor severance. First, the parties explicitly incorporated the AAA rules into their contract. If substantive defects exist in the drafted arbitration agreement, AAA rules can correct or supplant those deficiencies without impairing the purpose of the contract or the effectiveness of its arbitration provision. Second, AAA's rules, designed to function independently of each other,

offer additional protections to ensure that all parties in arbitration operate on an equal playing field.

REASONS TO GRANT THE WRIT

I. The Ninth Circuit's Decision Not To Sever Purportedly Unconscionable Provisions From An Otherwise Valid Arbitration Clause Is Antithetical To This Court's Precedent Favoring Arbitration

The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Federal Arbitration Act, 9 U.S.C. §§ 1-16, provides that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis supplied).

The primary goal of Congress in enacting the FAA was to *equalize arbitration agreements* with all other contracts by ensuring their enforceability in the face of hostile state law. *Perry* v. *Thomas*, 482 U.S. 483, 493 (1987) ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [section] 2".).

Section 2's expression of public policy favoring arbitration has been repeatedly validated by this Court. *Southland* v. *Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the [F]ederal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); *Volt Info. Scis., Inc.* v. *Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) ("[E]ven when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (citation omitted)); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[T]he FAA's purpose [was] to reverse the longstanding judicial hostility to arbitration * * * and to place arbitration agreements upon the same footing as other contracts."); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" (citation omitted)).

Despite § 2's directive that arbitration agreements be free from the effects of state laws that discriminate against them, California law continues to display its hostility toward arbitration by applying

to arbitration a totally different test of procedural and substantive unconscionability. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011); see also similar manifestations of ingrained bias by California state courts illustrated by two decisions: *Bruni* v. *Didion*, 160 Cal. App. 4th 1272 (2008) and *Baker* v. *Osbourne Dev. Corp.*, 159 Cal. App. 4th 884 (2008).[3] In stark contrast to how it addresses severability when other contract terms are potentially unenforceable, California greatly restricts access to severance when arbitration rights are at issue.[4] Such discrimination is

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[3] *Baker* v. *Osborne Dev. Corp.*, 159 Cal. App. 4th 884 (2008), found unconscionability in an arbitration clause because it was one-sided, meaning that one party would have reason to institute legal proceedings. Shortly after *Baker*, a different panel of California's Fourth District Court of Appeal decided *Bruni v. Didion*, 160 Cal. App. 4th 1272 (2008). *Bruni* holds that an arbitration clause could be invalidated because it covered all disputes that might arise between the parties. Between *Bruni* and *Baker*, it is unclear how arbitration clauses of any scope in California can survive—one seeks the broadest scope of dispute coverage and full bilateral application while the other limits the scope of disputes that can be subjected to arbitration. Given this incompatibility, it is difficult to see how a party could navigate between this arbitral Scylla and Caribdis.

[4] Petition ("Pet.") 12-16; see also Steven A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 HASTINGS BUS. L. J. 39 (2006) (concluding from an extensive empirical review of California Court of Appeal cases from 1982 to 2006 that unconscionability challenges succeed with far greater frequency when the disputed term is an arbitration provision). This analysis strongly suggests an ingrained California bias against arbitration. In 47% of the cases where arbitration was involved, the agreement was found

(Continued on following page)

even more egregious where—as here—the contract itself provides for severance of unenforceable terms and provisions.

This discrimination will curtail access to arbitration. Most arbitration clauses today, in both standardized and non-standardized contracts, are broad and intended to cover all disputes, including statutory claims, that might arise between contracting parties. The majority of such clauses, including the arbitration clause in this case, explicitly incorporate AAA rules and procedures. The breadth of such clauses represents a conscious decision by parties to maximize the benefits of arbitration under an established ADR service provider. The Ninth Circuit's decision frustrates these efforts because severance of unenforceable contract provisions is greatly restricted when arbitration rights are involved. Any misstep in contract drafting threatens the parties' ability to enforce perfectly lawful parts of their dispute resolution agreements.

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unconscionable, as compared to 11% of cases addressing unconscionability as to a contract provision that did not relate to arbitration. In only 11% of the arbitration cases was the unconscionable provision severed. The sample involved 114 cases.

II. The Rules of the American Arbitration Association ("AAA") Provide A Due Process-Compliant Framework For Adjudication And An Effective Way To Address Unconscionable Contract Provisions

This Court has recognized, time and time again, the importance of providing parties with a fair forum in arbitration. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1911). Although certainly not a requirement of arbitration, when parties incorporate AAA rules—employment, labor, commercial, construction, international—there is a heightened judicial tendency to find the underlying arbitration process fair and due process-compliant. *Cole* v. *Burns Int'l Sec'y Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

A. AAA's Rules Can Remedy Any Potentially Serious Contractual Defects

In this case, the district court and the Ninth Circuit found flawed several provisions of the parties' contract. However, irrespective of whether these provisions are severed, AAA's Commercial Arbitration Rules serve as effective gap-fillers, to be used when needed to replace an unconscionable contract term or restore to the arbitral process even-handed treatment of the parties. If the Employment Arbitration and Mediation Rules of AAA apply, they would completely trump offending provisions in the parties' contract

and remove all traces of unconscionability. For example, Rule 1 of the Employment Rules provides:

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its *Employment Arbitration Rules and Mediation Procedures* or for arbitration by the AAA of an employment dispute without specifying particular rules.* *If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.*

American Arbitration Association, Employment Arbitration Rules & Mediation Procedures, Rule 1 (2009) (emphasis added); Brief of *Amici Curiae* ("BAC") App. 11.

Irrespective of whether the Commercial or Employment rules are applied to the contract here, AAA's procedures provide fairness to all parties. They mean that, if normal contract severance rules are applied, an even-handed and carefully-considered set of rules will govern. These rules can be applied to preserve the parties' agreement to arbitrate. A few examples are illustrative.

1. Six-Months Limitation Period

The courts below found unconscionable a provision that required plaintiffs to initiate arbitration

within six months of the time a claim or controversy arose. Pet. Appendix A-3a, 21a. In so concluding, the courts failed to consider that, whether or not the six month provision remains in effect, the AAA's Commercial and Employment Rules give the arbitrator the authority to decide whether or not a claim is timely filed. Commercial Arbitration Rule, R-7(a) (Jurisdiction) states: "The arbitrator *shall* have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Arbitration Rules & Mediation Procedures, Rule R-7 (2013) (emphasis added); BAC App. 1.[5]

This rule is consistent with the recognized principle that procedural issues are usually reserved for arbitrators to determine, not courts. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (reaffirming the policy favoring the enforceability of arbitration clauses and holding that arbitrators must decide gateway procedural issues such as whether a claim is time-barred or has been waived).

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[5] Rule 6 (Jurisdiction) is the parallel provision in the Employment Arbitration and Mediation Rules of the American Arbitration Association, as amended and effective November, 2009.

The basic point is simple: whether the contract's six-month limitations provision is severed or not, the arbitrator is authorized under AAA rules to decide the timeliness of a claim. In assessing timeliness, the arbitrator could take into account any exigent circumstances, equitable considerations and factors like delayed discovery or continuing contract violations. The right of the claimant to obtain appropriate relief may remain intact despite the contract's six-month claim submission provision based on the operation of AAA rules.

2. Arbitrator Selection Process

The courts below found the arbitral selection process flawed because it placed the right of selection in the hands of *only* one party. Pet. Appendix A-3a, 22a. AAA rules rectify this imbalance by allowing each party an opportunity to participate in selecting the arbitrator. Under R-12 (Appointment From National Roster), the AAA prepares and submits a list of neutrals with subject matter experience. BAC App. 2. Each party is given ten days to rank their acceptable choices. From the lists returned to the AAA, the parties' mutual choice is invited to serve and adjudicate the case. In the event the parties cannot agree, the AAA will make the final appointment, subject to disqualification for cause. AAA makes every effort to ensure that the parties' mutual choice is ready, willing, and able to serve.

3. Cost And Fee Shifting Clause

The contract here awards fees and costs to the prevailing or "substantially prevailing" party. Pet. Appendix A-57a. According to the district court, this provision is objectionable because it could mean that even if the plaintiffs in arbitration prevailed on some of their claims, they may still be subject to absorbing defendants' attorneys' fees. Pet. Appendix A-25a.

If the court were to sever this provision, R-47 (Scope of Award) of AAA's Commercial Arbitration Rules would fill the gap. This rule gives the arbitrator the authority to grant any remedy or relief the arbitrator deems just and equitable and within the scope of the parties' agreement. Subsection (b) states that an arbitrator may assess and apportion the fees and expenses as the arbitrator determines appropriate.

4. Filing Fees And Punitive Damages

AAA's rules also address responsibility for payment of filing fees and the availability of punitive damages. Those AAA rules permit the arbitrator to decide exactly how such fees will be allocated and to set forth such amounts when rendering the final award. BAC App. 9.

With respect to punitive damages, R-47 (Scope of Award) clearly indicates that an arbitrator can render any award deemed just and equitable. This rule means an arbitrator could award punitive damages in

a case where the right to them is established. The provision in the parties' contract that precludes the arbitrator from making material errors of law is exactly the kind of provision that could confer on the arbitrator authority to award punitive damages if the evidence warranted them. Again, the AAA's Commercial Arbitration Rules would embed into the contract, as though the purportedly unconscionable provision were non-existent.

B. AAA's Rules Offer Other Significant Protections

The AAA is an industry standard arbitration provider in part because its arbitration rules incorporate extensive safeguards to ensure the neutrality and fairness of its processes. An illustrative sample of such rules includes:

- R-17 (Disclosure) (Protects the notion of *independent, impartial decision-making by creating* an *affirmative duty* to disclose conflicts of interest; the duty to disclose continues until the award is rendered). BAC App. 3.
- R-22 (Pre-Hearing Exchange and Production of Information) (Allows for ample exchange of information without compromising the economic and format efficiencies associated with the arbitral process). BAC App. 3-5.
- R-26 (Representation) (Assures the right of counsel). BAC App. 5.

- R-32 (Conduct of Proceedings) (Promotes full and expeditious presentation of the case by all parties). BAC App. 5-6.
- R-33 (Dispositive Motions) (Recognizes the growing complexity of arbitration by authorizing arbitrators, in appropriate cases, to hear and decide dispositive motions). BAC App. 6.
- R-34 (Evidence) (Allows the parties to offer such evidence as is relevant and material to the controversy and grants discretionary authority to the arbitrator to obtain additional evidence if necessary. The rule also permits the arbitrator, if authorized by law, to subpoena witnesses or documents). BAC App. 7.
- R-37 (Interim Measures) (Equalizes arbitration remedies with litigation remedies by explicitly authorizing an arbitrator to grant interim measures based on a showing of need. Such measures can include injunctive relief and measures for the protection or conservation of property). BAC App. 7-8.
- R-39 (Closing of Hearing) (Ensures that hearings are not officially closed until the arbitrator is satisfied that all evidence has been presented). BAC App. 8.
- R-40 (Reopening of Hearing) (Permits additional deliberations upon a showing of cause, before an award is rendered). BAC App. 9.

- R-50 (Modification of Award) (To further guard against adjudicative waste, this internal mechanism permits either party to request modification or clarification to correct "typographical errors or ministerial omissions or clarify the award to eliminate internal inconsistence or ambiguities"). BAC App. 10.

Each of these rules is independent. Each embraces a different aspect of the arbitral process. Deleting offensive clauses in the parties' arbitration agreement would leave in place the AAA's built-in procedures and protections that promote the just and efficient resolution of claims through arbitration.

CONCLUSION

The decision below constitutes a direct attack against arbitration. "Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,'" and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), quoting *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (alteration in original).

AAA is a national and well-recognized non-profit ADR service provider. Under its rules, all parties derive the same benefits and burdens. Arbitration

offers many benefits, including efficiency, economy, and access to justice. The AAA's rules provide an even playing field for adjudication and are available when it is necessary to sever unconscionable contract provisions. The writ should issue to disapprove of California's rule denying equal treatment of arbitration under state law contract severance principles.

Respectfully submitted,

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APPENDIX A

Excerpts from American Arbitration Association, Commercial Arbitration Rules & Mediation Procedures (2013)

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment,

the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-22. Pre-Hearing Exchange and Production of information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at

the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents*. The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to

balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, Internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R.33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R.-37. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may

extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees,

expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

APPENDIX B

Excerpts from American Arbitration Association, Employment Arbitration Rules & Mediation Procedures (2009)

1. Applicable Rules of Arbitration

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its Employment Arbitration Rules and Mediation Procedures or for arbitration by the AAA of an employment dispute without specifying particular rules*. If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.

If, within 30 days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration for 60 days to permit the party to obtain a stay of arbitration from the court. These rules, and any amendment of them, shall apply in the form in

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* The *National Rules for the Resolution of Employment Disputes* have been re-named the *Employment Arbitration Rules and Mediation Procedures*. Any arbitration agreements providing for arbitration under its *National Rules for the Resolution of Employment Disputes* shall be administered pursuant to these *Employment Arbitration Rules and Mediation Procedures*.

effect at the time the demand for arbitration or submission is received by the AAA.

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6. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.